(1)

95-1394

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MILOS J JIRICKO, MD, - PETITIONER

VS.

LAKIN & HERNDON, P.C.
THE LAKIN LAW FIRM, P.C.
THOMAS L LAKIN. Lawyer
THEODORE R.DIAZ, Lawyer
DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MILOS J JIRICKO, MD
8007 COTTAGE GARDEN DR.,#302,
GERMANTOWN, MD 20874
301 916 0692

52 pp

QUESTION PRESENTED

is, whether the Supreme Court of the United States will create a breed appart, the lawyers, who, as the judicial process insiders, will be allowed to stand above the law of this country.

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LIST OF PARTIES

All parties of my law suit No:93-398 appear in the caption of the case on the cover page.

TABLE OF AUTHORITIES CITED

CASES

American Hemisp. Marine Ag v. Kreis,
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STATUTES AND RULES

Federal Rules of Civil Procedure

United States district court for Southern district of Illinois, East St. Louis, Local Court Rules.

OTHER

Illinois Law and Practice

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

Petitioner respectfully prays that a writ of certiorari issue to review an unpublished verdict of Court of Appeals for Seven Circuit, affirming a void judgment of the United States district court for Southern Illinois.

OPINIONS BELOW

The Judgment and an unpublished Order of the Court of Appeals for Seven Circuit appears in Appendix A and B.

JURISDICTION

The Court of Appeals Judgment was filed on October 23, 1995 and the Petition for Rehearing was denied on November 15, 1995. The extension of time to file for a writ of certiorari was granted to and including March 1, 1996 on February 5, 1996, in Application NO: A- 641.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V

> No person shall be deprived of life, liberty or property, without due process of law...

Federal Rules of Civil Procedure are listed in the text

STATEMENT OF THE CASE

In December 1990 I, Dr.Jiricko, hired the Respondents, Lakin law firm lawyers ['lawyers'] of Wood River, Illinois, to prosecute legal matter embodied into the Complaint prepared for me by the law firm of J.P.Clousen of Chicago. The Complaint, filed on February 1, 1991 at the United States district court for Southern district of Illinois under No: 91-92 by lawyers, alleged several counts including the count for Fraud and Deceit, Breach of contract and Conversion.

On April 30, 1991 the defendants in the law suit No: 91-92 filed their answer and asserted 'Motion to Dismiss'...

> "To enter an Order dismissing Count V of the Plaintiff's Complaint with prejudice and grant the defendants their cost."

On July 2, 1991 the Judge Stiehl Ordered:

> "Before the court is defendants motion to dismiss Count V of plaintiff's complaint to which plaintiff has not responded. Upon review of Count V of plaintiff complaint, the court finds that Count V does not state a cause of action for conversion. Accordingly, defendants motion to dismiss Count V of plaintiff complaint is granted and Count V is dismissed. Plaintiff is granted thirty (30) days in which to file amended complaint" . [US district Court, Judge Steihl]

On September 19, 1994, Judge held:

> "Of consequence to plaintiffs' claims based on alleged fraud and malpractice is the fact that when the Court dismissed the conversion count in No:91-92,it did so pursuant to Rule 12(b)(6) and dismissal was without prejudice.

On September 13, 1991 the lawyers filed

'Motion to withdraw as counsel', based upon the lawyers statement that ..."the law suit will not be successful", which the district court granted and on January 2, 1992 the Court entered 'Order of lawyers withdrawal'; on June 23, 1992, the district court entered 'Order of failure to prosecute'. On my appeal, to the US Appeals Court for 7 Cir., I stated that the dismissal was erroneous and caused by the fraud and collusion of my lawyers and that it should be vacated. The US Appeals Court Ordered:

> "Apparently,Jiricko believes that if his lawyer committed malpractice or breached its contract with him then we should reverse. A party is bound by the acts of his attorney; his recourse for attorney error is a suit against the attorney, not a nullification of what the attorney did".[US Appeals Court, No:92 2613]

On June 10, 1993 I filed Complaint No: 93-398 at the same US district court for the Southern Illinois, alleging that the

lawyers violated their fiduciary duties breached the contract, perpetrated fraud, colluded and that they converted my legal files. [Complaint No:93-398.]

The Lakin law firm lawyers filed their answer through the Moser & Marsalek law firm of St. Louis and while they admitted that they acted as my lawyers, they denied the allegations I presented in the Complaint No: 93-398.

On November 12, 1993, the lawyers served upon me Motion for Summary Judgment:

> "Pursuant to Rule 56 of the F.R.C.P and Rule 5 of the Rules of the US district court,..there is no genuine issue of material fact..., Lakin's representation of plaintiff is not the proximate cause of plaintiff's alleged damages"...

I have immediately provided the critical evidence in my cause of action for the lawyers' violations of the fiduciary duties, fraud and collusion and, acting under oath, I provided and served my

personal affidavits on December 6, and on December 15, 1994 with my response, and I legally evidenced prima facie cause of action for violations of fiduciary duties by my lawyers, I pleaded in my law suit No: 93-398 [Appendix C]. I also included new evidence showing that I had a valid cause of action for conversion...

> "Plaintiff argues at length that the conversion claim had merit"..[Order, District Court, September 19, 1994]

In my Affidavits, I declared under oath, that the lawyers have not informed me that the Motion to Dismiss was filed and received, that they have not informed me that the Court Order of July 2, 1991 was entered by the district court and received by the lawyers and that the lawyers have not sought or obtained from me an informed consent on what to do after the court's July 2, 1991 dismissal. I have also expressly requested an oral,

public hearing to be held upon the evidence the lawyers submitted with their motion for summary judgment- none was ever held. The lawyers admitted that they have not filed the amended Complaint by the August 1, 1991 deadline.

On September 19,1994 federal Judge Stiehl issued Memorandum and Order:

"The matter is before the Court on defendants' motion for summary judgment. Plaintiff has filed a response to the motion. The complaint raises three claims (1) fraud and fraudulent concealment(2) malpractice, negligent misrepresentation (3 conversion. In his first two claims, plaintiff alleges that as a result of defendants negligent handling of his law suit against Illinois Anesthesia, he lost money damages on his claims.
Of consequence to plaintiff's claims based on alleged fraud and malpractice is the fact the when the court dismissed the conversion count in No:91-92 it did so pursuant to Rule 12(b)(6), and the dismissal was without prejudice.
Plaintiff lost his claim for conversion not because defendants failed to file an amended complaint, but because plaintiff failed to prosecute his claims. At the time the cause of action was dismissed,no ruling has been made on the merits of the

conversion claim and although technically dismissed, plaintiff could have attempted to amend the complaint to renew his claim. Therefore the court finds that plaintiff's claims based on fraud and malpractice must fail... [Order, District Court, September 19, 1994]

The F.R.C.P., Rule 41(2)(b) demands:

"Unless the court in its order for dismissal otherwise specifies, any dismissal not provided for in this rule, other then a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits".

&

In any event, the Supreme Court has clearly stated that the dismissal under Federal Rule of Civil Proc. 12(B)(6) is a judgment on merits. [N.A.A.C.P. v. Hunt, 891 F2d 1560]

The federal law mandates of the Judge to examine the entire Complaint and further requires:

"No claim may be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff cannot obtain any relief. Rule 12(b)(6),28 U.S.C.A. Seven-up Bottling Co v. Seven Up Co.

REASONS FOR GRANTING THE PETITION

The district court Judge Stiehl Judgment issued on September 19, 1994 was rendered in the violation of due process of law, and thus it is void. It was deliberately issued as a cover up for the violation of law, perpetrated by the officers of the court. The Appeals Court for Seven Circuit ratified the district court judgment, incapable of ratification, while the US. Appeals Court for Fifth Circuit, involved in the same issue categorically stated, "we must reverse", John Deere Co v. Am. Natl.Bank, Stafford. The rules regulating judicial proceedings in the United States district courts are the Federal Civil Judicial Procedure and Rules [F.R.C.P].

F.R.C.P.,Rule 56 demands:

> The judgment sought shall be rendered forthwith if the pleadings..., show that there is no genuine issue as to any material facts...

Motion for Summary Judgment, served upon me by the lawyers on November 12, 1993, alleged that there is no genuine issue of material fact and that the lawyers are entitled to summary judgment.

I have responded and I have, under oath evidenced prima facie case for fiduciary duties violations, requiring the lawyers to proceed with the case.

> The breach of fiduciary duties is a question of fact. [David Welch Co v. Erskine & Tulley, 250 Cal.Repr. 339]

The lawyers' motion was submitted pursuant to Rule 56 of the F.R.C.P., and Rule 5 of the Local Court Rules:

"Rulings on all motions will be issued within forty-five days after due date of any answering brief". US. district Court, Southern Illinois Local Court Rules.

The US. district court thus further defined the F.R.C.P., Rule 56 'forthwith' to mean, within within forty five days after the due date of any answering brief

or in case No:93-398, at about the February 1, 1994 date.[F.R.C.P.,Rule 78]. There was no summary judgment issued by the judge Stiehl during this time and the only summary judgment issued in the case No: 93-398 is dated September 19, 1994. Therefore, if the Judge's September 19, 1994 summary judgment was issued in response to the lawyers' summary judgment motion, served on November 12, 1993, the September 19, 1994 judgment was rendered without the Judge's authority and thus unlawfully, as the Judge's noncompliance with the F.R.C.P. deprived him of the authority to act and the Judge's power was not lawfully invoked. [Wade v. Bethes. Hosp., 337 F.Supp. 670].

> Defendants' filing and service of their motion for summary judgment and passage of over a year did not satisfy ten days notice and hearing requirements of summary judgment rule. [Capital Films C. v. Charles Fries Products, 628 F.2d. 387]

The Judge Stiehl's Judgment of September 19, 1994 is thus unconstitutional.

Further,

since there was no summary judgment rendered upon the lawyers' November 12, 1993 motion by the Court within the time provision mandated by the rules, the lawyers' November 12, 1993 motion for summary judgment became a nullity after the February 1, 1994 date, as the conditions which alone empowered the Judge to exercise his judicial power upon it were wanting; Wade v. Bethesda Hospital et al.,337 F.Supp. 670

In May 1994, the district court issued 'Notice of Hearing', which was served upon me on May 13, 1994, and which notified me that the court ordered the trial date is the month of November,1994. On the September 19, 1994, however, without any notice to me whatsoever and just few days before the scheduled trial,

I received in the mail the Judge Stiehl's summary judgment, while the F.R.C.P., Rule 56(a)(c)(e) requires:

[A] party seeking to recover may ...move for summary judgment...the motion shall be served at least 10 days... when the motion for summary judgment is made and supported as provided...

Local Court Rules, Rule 5 (c) required:

> [M]motion for summary judgment shall be supported by a separate brief filed with motion. Failure to file a brief with the motion constitutes grounds for denial of the motion.

Thus, in September 1994, a scheme was devised whereby the lawyers' November 12, 1993 motion was put to use as a decoy and a cover up for the Judge action, dated September 19, 1994. In furtherance of this scheme, the Judge then replaced the grounds,..."Lakin's representation of plaintiff is not the proximate of damages", with a new issue [*], namely that,..."plaintiff could have attempted to amend the complaint to renew this

claim", and then held..,"therefore, the court finds that plaintiff's claims based on fraud and malpractice must fail", and instantly issued Order which deprived me of my entire law suit No:93-398, without giving me a required notice and without giving me an opportunity to respond and to be heard, and by testimony or otherwise to rebut the grounds the Judge advanced. The lawyers and the judge, while knowing that there was a prima facie action fully evidencing genuine issues of material fact pending before the court, preclusive to any summary adjudication, to avoid the upcoming jury trial concocted a scheme, whereby the lawyer's November 12, 1993 null motion was utilized by the judge to advance his new grounds, the Judge Stiehl submitted and at the same breath, adjudicated. Judge Stiehl's September 19, 1994 Order, dismissing my entire case No: 93-398 on

merits, thus issued in the violation of F.R.C.P., in the violation of due process of law and in the violation of the United States Constitution , Amendment Five.

> Since the district court relied on grounds not advanced by the moving party as a basis for granting summary judgment and did not give proper notice to the Bank before granting judgment on such grounds, its judgment cannot be upheld on appeal. John Deere Co v. American Natlt. Bank, Stafford, 809 F2d 1190.

[*] In addition to procedural violations, the new grounds the judge introduced on September 19,1994 were also substantially false. The Judge Stiehl knew that I appealed the case No:91-92 and the judge received the Appeals Court Order in the matter of the law suit No:91-92, and the Judge knew the mandate of Appeals Court, which Ordered the lawsuit against the lawyers, and not an 'undoing of the lawyers' fraud', by a collateral action of the plaintiff.[App. Court No:92 2613]

Further, the Judge recognized my cause of action for fraud, i.e."plaintiff's claims based on fraud must fail". Thus the judge knew full well that in the case of fiduciary duty violations, the Illinois law specifically prohibits the agent to impute his fraud to the principal:

Griffith v. Parks, 165 Ill.App. 337 and Schafer v. North Chicago St.R.Co, 82 Ill App. 473 & Greyca v. Proud, 826 F2d 1560.

Judge Stiehl's action, which deprived me of my entire law suit, was only designed to avoid the jury trial, by subverting the integrity of the judicial process to a cover up for the lawyers' fraud.

On my appeal I filed in 1994, the Appeals Court ratified the unconstitutional judgment of the district court.

> "A void judgment is in legal effect no judgment. By it no rights are devised. All proceedings founded upon it are equally worthless".
> State ex.r. Reed v. Gormley,82 P 929

I have respectfully submitted the matter to the United States Appeals court for Seven Circuit, and the Appeals Court was duty bound to consider the entire matter in the light most favorable to the non-movant/Dr.Jiricko and to treat my pleadings [Appendix C] and the evidence, I provided and submitted under oath, as true. The Appeals Court for Seven Circuit however, applied its blind eye upon the lawyers' flagrant fraud and the district court's cover up, and only by an improvident act, the Appeals Court ratified the unconstitutional order of the district court.

I have faithfully filed my briefs, and, under oath, I have fully presented the violation of the fiduciary duties, deliberately perpetrated by the lawyers upon me, during their retention as my attorneys in 1991 year.

> "Plaintiff correctly asserts that defendants cannot insulate themselves from any liability which they may have incurred during the course of their retention".[Defendants' Reply to Plaintiff's Response to the Motion for Summary Judgment, page 3.]

Inasmuch as the lawyers themselves evidenced that they cannot be exculpated from the mandate of the Illinois law, commanding upon them specific statutory duties during the course of their retention as my lawyers in the 1991 year, the Appeals Court defective inquiry referencing only the 1992 year, dislocated the 'time from the crime', and thus made their own inquest only a mockery. The Appeals Court for 7 Circuit, an agency of public justice, thus not only turned its turned its blind eye upon the fellow officers deplorable fraud it was presented with, but further, the court then employed its self inflicted blindness as a pretext to its own impotence and silence in dealing with it;

such 'judicial process' violates the mandate of the United States Supreme Court and it is a disgrace upon the United States public, the Supreme Court of the United States should not overlook.

"A principal has a right of action against agent for a violation of any of the duties which agent owes to his principal...the cause of action is the wrong done and not the measure of compensation".
Illinois Law and Practice.
&
... "usurpation of his client's decision is willful". Davis v. State Bar of Cal., 655 P.2d 1276.

Please refer further to Rogers v. Robson, 407 N.E. 2d 47, and to American Hemisph. Marine Ag v. Kreis, 244 N.Y.S.2d 602; Schlosser v. Jones, 406 N.E.2d 70; and to Mc.Daniel v. Gile, 281 Cal.Rep. 242,

The truth needs no disguise.

The Appeals Court, however, did not set out to determine the truth of the matter I presented, and to apply the Illinois law within its own previous mandate and

within the ruling of the Illinois Supreme Court in Village of Dolton v. S. Ellen Dolton Estate et al, 162 NE 214, and within the ruling of the United States Supreme Court, which all determined that the client's remedy is the law suit against the the lawyer. The Appeals Court even needed to stamp its Order with warning 'Not to be Cited', as its own Order No: 94-334, directly contradicts the Appeals Court's rule, it publicly declared as the law of the 7 Cir. in Malhotra v. Cotter & Co, 995 F2d 1395.

Pursuant to above discussion, I am confident to respectfully state, that the Appeals Court Judgment of October 23, 1994, No:94-3344, and the affirming the district court summary dismissal is without any moral or legal justification, and its written Order form only serves as the evidence that the Appeals Court for Seven Circuit deals double standard of

of justice; one for the ordinary citizens and a different one for the lawyers.

While the United States Appeals Court held that 'deceiver is liable', no matter what means he uses, [Gibbons v. Brandt et al, 170 F2d 385], the 'lawyer/deceiver', however, is allowed to subvert the integrity of the judicial process as a cover up for his own wrongdoing.

The Supreme Court Justice Hon. Roberts said that no fraud is more odious that an attempt to subvert administration of justice.

The United States Supreme Court declared:

> Tampering with the administration of justice in the manner indisputably shown here involves far more then an injury to a single litigant. It is wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated with the good order of society. Hazel-Atlas Co. v. Hartford Co., 322 US 238

The practice of law is a public trust and

thus the complete trust between a lawyer and his client is a pre-requisite to the public, to the judicial process and to the Supreme Court, which exercises its supervisory powers over the entire process. In this Petition, I have under oath evidenced, that the integrity of judicial process and the administration of justice was subverted to a cover up for the lawyers own fraud. It is for this reason that I am respectfully submitting my Petition for Writ of Certiorari, and, I am most respectfully invoking the supervisory powers of the United States Supreme Court.

CONCLUSION

I respectfully pray that the Supreme Court of the United States orders the review of this matter in its entirety and that the Court grants my Petition for Writ of Certiorari.

Respectfully submitted.

DATED: February 26, 1996.

Subscribed and sworn to be true and to may best knowledge and belief:

MILOS J JIRICKO, MD
8007 COTTAGE GARDEN DR.,#302,
GERMANTOWN, MD 20874
301 916 0692

Notary public:

SHERRY L. DOUGHERTY
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires February 16, 1998

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT -WITHOUT ORAL ARGUMENT

Date: October 23, 1995

BEFORE: Honorable Richard A. Posner,

Honorable Walter J. Cummings

Honorable William J. Bauer

No. 94-3344

MILOS J. JIRICKO, M.D
Plaintiff- Appellant

v.

LAKIN & HERNDON,P.C. LAKIN LAW FIRM, THEODORE DIAZ, attorney at law, et al.,
Defendants- Appellees

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.
No.93-C 398, William D.Stiehl, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date. Further, it is ORDERED that plaintiff shall have fourteen (14) days from the filling date of this order to respond to the court's rule to show cause.

(1060-1103930) APPENDIX A

APPENDIX B

UNITED STATES COURT OF APPEALS

/UNPUBLISHED ORDER/
/NOT TO BE CITED/
/PER CIRCUIT RULE 53/

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 8, 1995
Decided October 23, 1995.

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

No. 94-3344

MILOS J. JIRICKO, MD	)Appeal from the
	)United States Court
Plaintiff-Appellant	)for the Southern
	)District of Ilinois
v.	)No.93-398
	)
LAKIN & HERNDON, P.C., et al.,	)
	)William D.Stiehl,
Defendants-Appellees	)Judge

ORDER

Plaintiff Milos J.Jiricko,MD sued his former employer for conversion, and the claim was dismissed without prejudice. Subsequently, Jiricko's attorneys received permission to withdraw, and Jiricko refused to hire new counsel.Six

month later, his conversion claim was dismissed for want of prosecution. This court affirmed that dismissal in Jiricko v. Illinois Anesthesia Ltd., Nos.92-2613,92-2682 (7Cir. Aug.271993) (unpublished order)1993WL326697. Now Jiricko has sued his former attorneys in this diversity legal malpractice suit

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1 After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that the parties could file a 'Statement as to Need of Oral Argument",see Fed.R. App.P.34(a);Cir.R.34(f). Plaintiff filed such a statement, which the court has considered.The appeal is submitted on the parties briefs and the record.

---

for failing to pursue his conversion claim. The district court entered summary judgment for defendants. After having reviewed de novo the district court's grant of summary judgment in favor of defendants, we agree that no material factual dispute remains, and that as a matter of law, defendants are entitled to judgment. See Fed.R.Civ.P 56(c).

A legal malpractice case requires proof of duty owed by an attorney to a client. Havoco of America,Ltd v. Freeman,Atkins & Coleman Ltd, 58 F3d 383.(7th Cir.1995) (Illinois law);Zych v. Jones, 84 Ill.App. 3d 637,406 N.E.2d 70.(Ill.App.1980).In the underlying conversion claim ,in January 1992-a full six month prior to the final dismissal, the defendant

lawyers sought permission from the court to withdraw from representation of plaintiff. We have already held that there was nothing inappropriate about that withdrawal, Jiricko v. Illinois Anesthesia and we will not repeat that discussion here.Thus no attorney client relationship existed and defendants owed no duty to plaintiff in June 1992 at the time of final dismissal of the conversion claim.The dismissal for want of prosecution resulted from plaintiffs own conduct, after numerous extensions and warnings, in refusing to either hire new counsel or file a pro se appearance. See Otis v.City of Chicago, 29 F3d 1159,1169 (7 Cir. 1994(en banc).

The July 1991 dismissal order did not use the technical legal phrase "without prejudice", but it specified in non-legalese that plaintiff could file an amended complaint.

Accordingly, defendants motion to dismiss Count V of plaintiff's complaint is GRANTED,and count V is DISMISSED. Plaintiff is granted thirty (30) days in which to file an amended complaint.

A dismissal under Fed.R.Civ.P.12(b)(6) granting plaintiff the opportunity to amend the complaint is not final until the time to amend has passed.See Otis v. City of Chicago,29 F3d at 1165.Eberhardt v. O'Malley 17 F3d 1023,1024 (7Cir.1994) Plaintiff failed to either file an amended pleading,or to request additional time.

Plaintiff also protests that he was not given notice and hearing prior to the district court's ruling on defendants motion for summary judgment. No hearing is required where the pleadings before the court demonstrate no genuine issue of material fact. Fed.R.Civ.P56. And a plaintiff hardly needs notice that the court is going to rule on a summary judgment motion when the plaintiff filed responses and the motion remains pending before the court.

Normally we would end our discussion here/2.However, plaintiff continual

---

2/Having found no attorney- client relationship and thus no duty owed by defendants to plaintiff, we need not go on to discuss the fact that the conversion claim which Jiricko wanted defendants to refile had no merit, and thus any negligence by defendants in not-refilling the claim could not have damaged Jiricko,See Havoco, 58 F3d at 386 (discussing plaintiff need "to recreate and litigate the action which was never filed")quoting Nika v.Danz,199 Ill.App.3d 296,556 N.E.2d 873,882(1990).The district court attempted to explain to Jiricko the complexity of this "trial within a trial" in a legal malpractice case, even analogizing to Hamlet, but Jirickco paid no heed.

---

usurpation of judicial resources,and the resources of defendants, generating reams of paper hours of toil,compel us to add several comments.In the underlying conversion case dismissed for want of

prosecution, from his attorneys court approved withdrawal on January 2,1992 to the suit dismissal on June 24,1992, Jiricko blatantly refused to either hire new counsel or file an appearance pro se. There is little question that he understood the proceedings. He is well educated, a physician, he he wrote understandable (thought ultimately meritles) pleadings, arguments, motions and briefs , and he articulately presented his argument orally at the district ourt.Yet the deportment repeated itself in the present suit for malpractice The district court again went to great length to explain procedural and substantive laws to Jiricko, and to encourage him to hire an attorney in his legal malpractice suit.The court was forced to spend scarce resources on month of hearing one irrelevant motion after another, and as compelled to make repetitious explanations , about pretrial procedures, conversion, and malpractice. Jiricko is not a stranger to litigation.See Jiricko v. Coffeyville Memorial Hospital,700 F.Supp.1559 (D.Kas.1988)Jiricko v. Cofeyville Mem., Hospital,628 F.Supp.329(D.Kas,1985).But Jiricko refuses to hear the free advise given to him by every judge who confronts these ineffective filings.

In the appeal in the underlying conversion case, we imposed sanctions against plaintiff for the filling of frivolous motions which we found replete with arguments that were 'repetitious", simply irrelevant","mere semantics","faulty",and "frivolous".

We found that Jiricko, by his filings had "multiplied the proceedings in this court unreasonably and vexatiously.Illionois Anesthesia 199 WL 326697 at **3-4. Pursuant to Fed.R.App.P.,38 and Civ.R. 38, on the court's own motion we give plaintiff 14 days from the date of this decision to show cause why we should not impose sanctions on him for filing a frivolous appeal.Cf.Support System International,Inc. v. Mack 45 F3d 183(7 Cir.1985)(per curiam).

The judgment of district court is AFFIRMED.Further it is ORDERED that plaintiff shall have fourteen days from the filing of this order to respond to the court's rule to show cause.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

MILOS J.JIRICKO,MD)
)
PLAINTIFF)
NO:93-398 WDS
vs.)
)
LAKIN & HERNDON,P.C.)
THE LAKIN LAW FIRM,P.C.)
THOMAS L LAKIN,Attorney at Law)
THEODORE R.DIAZ,Attorney at Law)
DAVID W.DUGAN,Attorney at Law)
JEFFERY C.WEISHAUPT,Attorney at Law)
)
DEFENDANTS)

COMPLAINT

Now comes the Plaintiff, Milos Jiricko, MD, and for cause of action against the Defendants,

The Lakin & Herndon,P.C.; The Lakin Law Firm,P.C.; Thomas L. Lakin, attorney at law; Theodore R. Diaz, attorney at law; David W. Dugan, attorney at law; and Jeffery C. Weishaupt, attorney at law ("Lakin law firm lawyers"), states as follows: [EXCERPTS]:

FRAUD and FRAUDULENT CONCEALMENT

9. The Lakin law firm lawyers induced Dr. Jiricko into signing the written contract titled 'Agreement to Represent' by

APPENDIX C

representing,that Dr.Jiricko has specific valid claims and cause(s) of action for damages against Illinois Anesthesiology Ltd.;these were enumerated by the written legal document [the Complaint], prepared for Dr.Jiricko by the law firm of J. Paige Clouson and Associates, of Chicago, Illinois and given to the Lakin law firm lawyers by Dr.Jiricko. The defendants further represented that they shall properly execute on Dr.Jiricko's behalf all necessary steps to prosecute this Complaint. Only in reliance upon these representations, 'Plaintiff/Dr.Jiricko' then signed the 'Agreement to represent'. [Attached as Exhibit A and incorporated herein as if re-written.]

10. The Lakin law firm lawyers filed the Complaint, signed by L.Thomas Lakin, at the United States District Court for Southern Illinois, East St.Louis, Illinois, on February 1st, 1991.

The Complaint was filed under the requisites of the Federal Rules of Civil Procedure and the proceedings were to be carried out under the United States Constitutional requirements of the due process of law.

[Complaint attached as Exhibit B, and incorporated herein as if re-written]

11. The Motion to dismiss was filed by the Carr, Korein, Tillery, Kunin, Glass Montroy & Bogard ["Carr law firm lawyers] on April 30th, 1991. [Attached as Exhibit C & D, and incorporated herein as if fully re-written.]

12. The motion to dismiss cunningly stated that the Plaintiff's Count V, /Conversion/ of the Complaint, among other things... "has failed to allege facts sufficient to support a claim for conversion"... and that ..."the court must enter an order dismissing Count V with prejudice". [Exhibit D]

13. The statements in the Motion to dismiss were made for improper purpose, were false and deceitful, and the Lakin law firm lawyers, experts in the law and its application knew that to be so; the Carr law firm lawyers admitted that .."the Plaintiff attempts to state a claim against Defendant Leonard R. Becker...for conversion".

Thus the defendants and the Carr law firm lawyers knew full well that the 'Plaintiff/Dr.Jiricko's Complaint pled a valid claim for conversion, [Refer to Exhibit B] and that Dr.Jiricko would have been successful in the prosecution of this action.

14. Dr.Jiricko's rights, among others, right to loyalty, honesty and good faith dealing, right to be informed and to be provided with the full disclosure of all matters relevant to the pending litigation and right to receive a

negligence free services- were created by the Lakin law firm lawyers' contractual, statutory and fiduciary duties and obligations to their client/ Dr.Jiricko.

15. The Lakin law firm lawyers willfully violated Dr.Jiricko's rights and willfully breached their duties when they failed to apprise Dr.Jiricko that the Motion to Dismiss was received, that it was pending at the United States District Court, and what ought to be the 'Plaintiff's/Dr.Jiricko's requisite response.

16. The meritless and deceptive motion to dismiss, would have been easily defended by the 'Plaintiff/Dr.Jiricko' and should have been properly disposed of by the requisite action of the Lakin law firm lawyers; but for the Defendants' deceitful conduct of acommodating assistance, deliberately substituted for

the requisite adversarial judicial process - [corroborated to by the total absence of the defendants' due care and skills] - the 'Plaintiff's/Dr.Jiricko's' and the Court's deception would not have succeeded (Exhibit D) and the Count V /Conversion/ would not have been dismissed.

17. The Lakin law firm lawyers, while under the duty to prosecute, to engage and to act, when dealing with the deceptive motion to dismiss, deliberately remained silent and intentionally withheld the requisite rebuttal and deliberately withheld to employ and to engage the 'Plaintiff's Dr.Jiricko's readily available defense. The Lakin law firm lawyers conduct of corruptive silence and concealment only ratified, aided and abetted to the 'Plaintiff's/ Dr.Jiricko's and the Court's deception.

18. On July 2nd, 1991, the Court, noting

that the Plaintiff has not responded to the motion, stated...

> "Upon review of count V of plaintiff's compliant, the Court find that count V does not state a cause of action for conversion...Plaintiff is granted thirty (30) days in which to file an amended complaint."
> [Attached as Exhibit E]

19. The Lakin law firm lawyers willfully violated Dr.Jiricko's rights and willfully breached their duties to him by (a) Failing to disclose to the 'Plaintiff /Dr.Jiricko' that the Court's Order was received, by (b) failing to disclose that the filing of the amended Complaint was pending, and by (c) failing to apprise 'Plaintiff/Dr.Jiricko' of what was required to do.

20. Lakin law firm lawyers, as the Illinois State licensed lawyers and the experts in the law and its application knew, that the Federal Court is required to review the entire complaint, rather then only the Count V - when enacting

upon the Motion 12(b)(6).

Furthermore, the Lakin law firm lawyers clearly knew, that the United States Courts ruled in US v. Barrow that, when the defendants' motions are made pursuant to Rule 12(b),Fed.R.of Civ. Proc, that under Rule 12(d), R.R.Civ.P., they could not be decided without a hearing - simply since the granting of such motion must be considered the equivalent of trial:

> 'Right to be heard contemplates, at least, the opportunity to submit a a short written statement in opposition to the motion.[US v.Barrow 404 F2d 740]

21. The Lakin law firm lawyers - in the willful and reckless disregard to their promises and duties, fraudulently concealed matters they were affirmatively required to disclose, and by the conduct of deception and corruptive silence, caused the 'Plaintiff/Dr.Jiricko' to be disarmed and misled to his prejudice, committing fraud.

22. The defendants breached the written 'Agreement to Represent', misrepresented upon their own promises and recklessly breached their duties, when they deserted their client/Plaintiff and when they abandoned the prosecution of the case No 91CV00092-WDS, committing fraud.

30. The Lakin law firm lawyers, deliberately and methodically violated the basic tenet of the judicial advocacy and the very principles of the judicial system and by a preconcerted design of collusive, fraudulent actions, debased the very fundamentals of the adversarial judicial process into a mockery and sham proceedings.

31. Dr.Jiricko, as the direct consequence of the defendants wrongful, fraudulent acts, was deprived and swindled out of his claims for damages and monetary recompensation for Conversion, Fraud and Deceit, Breach of Contract, that

the Lakin law firm lawyers have claimed on Dr.Jiricko's behalf in the United States District Court, No:91CV0092-WDS.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MILOS J JIRICKO, MD, - PETITIONER

VS.

LAKIN & HERNDON,P.C.
THE LAKIN LAW FIRM,P.C.
THOMAS L LAKIN, Lawyer
THEODORE R.DIAZ, Lawyer
DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

CERTIFICATE OF SERVICE

I, Milos J. Jiricko,MD do swear or declare that on the date, 28th of February, 1996 as required by Supreme Court Rule 29, I have served the Petition for Writ of Certiorari on each party to the above proceedings or that party's counsel, and on every other person required to be served, by deposing an envelope containing the above documents in the United States mail properly addressed to the law firm of Moser & Marsalek,P.C., attn. Patrick J. Horgan, lawyer, 200 North Broadway, Suite 700, St.Louis, Mo 63102 and with first class postage prepaid.

The names of those served are as follow:

Lakin & Herndon,P.C.; The Lakin Law firm P.C.; Thomas L.Lakin; Theodore R.Diaz; David W.Dugan and Jeffery C. Weishaupt.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 1996.

Milos J Jiricko, MD
8007 Cottage Garden Dr.,#302
Germantown, MD 20874

(P) 95-1394

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MILOS J JIRICKO, MD, - PETITIONER

VS.

LAKIN & HERNDON, P.C.
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THOMAS L LAKIN, Lawyer
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DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL APPENDIX 'D',

MILOS J JIRICKO, MD
8007 COTTAGE GARDEN DR.,#302,
GERMANTOWN, MD 20874
301 916 0692

20 pp

SUPPLEMENTAL APPENDIX D:

Memorandum and Order, US District Court for Southern Illinois, East St. Louis, September 19, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MILOS J.JIRICKO CAUSE NO:93CV398 WDS
PLAINTIFF

v.

LAKIN & HERNDON,P.C.
THE LAKIN LAW FIRM,PC.
THOMAS L.LAKIN, Attorney at law
THEODORE R.DIAZ, JR, Attorney at law
DAVID W.DUGAN, Attorney at law
JEFFREY C.WEIHAIUPT, Attorney at law
DEFENDANTS.

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on defendants motion for summary judgment. Plaintiff has filed a response to the motion.

BACKGROUND

Plaintiff, acting pro se, filed this action against various current and former members, and the law firm of Lakin & Herndon, P.C. The complaint raises three claims:(1)fraud and fraudulent concealment; (2) malpractice - negligent misrepresentation;and (3)conversion,which

are alleged are alleged to arise from defendants' prior representation of plaintiff in an action based on an employment dispute against plaintiff's former employer, Illinois Anesthesia (No. 91CV 92 WDS). In his first two claims, plaintiff alleges that as a result of defendants negligent handling of his law suit against Illinois Anesthesia, he lost money damages on his claims. In his third claim plaintiff alleges that defendants converted his property when they refused to turn over his legal files to him once they withdrew from that case. Defendants seek summary judgment on all claims. Fed.R.C.P.56 (c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law".In determining whether a district court properly granted summary judgment, "all factual inferences are to be taken against the moving party and in favor of the opposing party". International Adm'rs, Inc. v. Life Ins. Co. of N. Am., 753 F2d 1373,1378 (7th Cir. 1985). In instances in which "inferences contrary to those drawn by the trial court might be permissible, a district court grant of summary judgment must be reversed. Munson v. Friske, 754 F2d. 683 690 (7 Cir.1985). Once motion for summary judgment has been made and properly supported, however, the nonmovant does have the burden of setting for specific facts showing the existence of genuine issue of a material fact for trial. See Rule 56(e), Posey v. Skyline Corp., 702 F2d 102,105(7 Cir.), cert. denied 464 US 960 (1983), (noting that " a bare contention that an issue of fact

exists is insufficient to raise a factual issue"). Although a requisite, the existence of a factual dispute is not, standing alone, sufficient to bar summary judgment. It is well settled that a "factual dispute does not preclude summary judgment unless ..."the disputed fact is outcome determinative under the governing law". Egger v. Phillips, 710 F 2d. 292,296 (7 Cir.cert.den.,464 U.S. 918 (1983), cited in Shlay v. Montgomery, 802 F2d. 918,(7 Cir. 1986).In the underlying action, this Court dismissed Count V of Jiricko's complaint against Illinois Anesthesia on a motion to dismiss under Fed.R.C.P.12(b)(6).Count V sough recovery for an alleged conversion by a Dr.Leonard Becker of payments for plaintiff's billed services. Plaintiff alleged that Becker, the president and sole shareholder of Illinois Anesthesia, billed for these

services rather than Illinois Anesthesia. The Court's order of dismissal was based on the fact that Count V did not contain the allegations necessary to satisfy the pleading requirements for a conversion action. After the Court's ruling, defendants determined that a conversion claim would not lie, and based on that determination decided not to file an amended complaint, and advised plaintiff of that decision. (Dugan Aff.Doc.#50, Ex.9).

In August of 1991, plaintiff was informed by defendants that they intended to withdraw from representation of plaintiff. (see Doc.#50, Ex.10). In his deposition, plaintiff acknowledged that he received the correspondence of August 1991, and an additional letter of September 10, 1991, which set forth the specific grounds for defendants' determination that they could no longer

represent plaintiff, or proceed further against Illinois Anesthesia. (See Doc. #50, Ex. 11 and Jiricko depo. Oct.8,1993, pp.76-77). Defendants thereafter filed a motion to withdraw in this Court, and the Court held a hearing on the motion. Appearing at the hearing were David Dugan, an attorney at Lakin & Herndon and a named defendant in this suit; Ferne Wolf attorney for Illinois Anesthesia; and Dr. Jiricko on his own behalf. (See Tr.Hr'g on Motion to Withdraw, No:91-CV-92-WDS, Dec.30,1991).The Court permitted Lakin & Herndon to withdraw from representation of plaintiff, and gave plaintiff thirty days to obtain new counsel, or enter his appearance pro se. (Id at 12) The Court entered a written order on January 2, 1992. After several interim orders concerning plaintiff's failure to comply with the Court's order, the Court dismissed plaintiff's case for

failure to prosecute.(Doc.#50,Exs.13 &14) On August 27, 1993, the Court of Appeals upheld the dismissal in an unpublished opinion. Jiricko v. Illinois Anesthesia, Nos.92-2613;92-2682(7th Cir.Aug. 27, 1993)

DISCUSSION

In the current action, plaintiff premises his claim on the loss of the conversion count in the underlying suit against Illinois Anesthesia. Plaintiff argues at length that the conversion claim had merit, and that he would have been allowed to proceed on that claim, but for defendants' abandonment of his claim (which is the basis for his malpractice assertion). The problem with plaintiff's assertion is that his claim and the lawsuit against Illinois Anesthesia was not lost by any action of defendants, but rather by plaintiff's personal failure to either obtain new

counsel, or enter his appearance pro se in the suit against Illinois Anesthesia. The Court permitted defendants to withdraw from their representation of plaintiff. The reason why they chose to withdraw is clear from the record in No. 91-CV-92-WDS, but, in all actuality, is of little relevance to this suit. Withdrawal granted by order of court does not constitute abandonment. Attorneys regularly seek to withdraw from representation when, for example, their client has not paid his or her legal fees, or the attorney and client are unable to "get along", or the attorney has made a professional judgment that the action is not viable and in all good professional conscience, the attorney can no longer actively pursue the claim. The latter situation arose in the underlying action. (Doc.#50, Ex.11). Whether the

professional judgment of defendants that plaintiff could not maintain a conversion claim against Illinois Anesthesia was valid ar not, as this Court noted, the contract between plaintiff and the defendants included a specific clause which allowed defendants to withdraw under the circumstances. (Tr.Dec.30, 1991 pp. 9-10).

Of consequence to plaintiff's claims based on alleged fraud and malpractice, is the fact that when he Court dismissed the conversion count in No.91-92, it did so pursuant to Rule 12(b)(6), and the dismissal was without prejudice. This means that the Court's Order did not act as a ruling on the merits of the claim, but rather was a ruling on the sufficiency of the pleadings. That is, the validity of the cause of action against Illinois Anesthesia based on

conversion was not a part of the Court's dismissal Order of July 2, 1991. Count V was dismissed because it did not satisfy the pleading requirements for a conversion claim. The dismissal was not final, i.e. plaintiff could have filed an amended complaint which, if properly pleaded, could have included a conversion claim. The Court's Order of July 2, 1991 gave plaintiff thirty days in which to file an amended complaint. No amended complaint was filed be the defendants during that time period, but that fact is not necessarily fatal to plaintiff's conversion claim. Plaintiff could have sought an extension of time in which to file amended pleadings even beyond the time set forth in an order of dismissal, or have sought leave to file an amended complaint our of time for good cause. Plaintiff lost his claim for conversion,

not because defendants failed to file an amended complaint, but rather because plaintiff failed to prosecute his claims. At the time the cause of action was dismissed, no ruling had been made on the merits of the conversion claim, and although technically dismissed, plaintiff could have attempted to amend the complaint to renew these claim. Therefore, the Court finds that plaintiff's claims based on fraud and malpractice must fail.

The only remaining issue, therefore, is plaintiff's claim that the defendants converted his property when they refused to turn over his legal file. Plaintiff address that because defendants did not deliver his file materials to him, they wrongfully converted the property. Under Illinois law:

> A proper complaint for conversion should allege:(1)an unauthorized and

wrongful assumption of control, dominion, or ownership by a person over the personality of another; (2) his right in the property; (3) his right to the immediate possession of the property, absolute and unconditional; and (4) a demand for possession thereof.

Mid-America Fire & Marine Ins. v. Middleton, 127 III App.3d 887, 468 N.E.2d 1335,1338 (1984) (citations omitted). In this instance, there is sufficient evidence in the record that defendants made plaintiff's files available to him, and that there was no refusal to turn them over.(Doc.#50, Exs.13,14). Plaintiff has failed to establish that a conversion of his property occured.The best evidence of this is plaintiff's own deposition which reveals that although he believes that he spoke with someone at defendant law firm about his file, he was unable to remember whether he telephoned or wrote the firm, with whom he spoke, or what was said to plaintiff about his file.

(Jiricko depo.Oct.8, 1993,pp.42-43). He was unable to recall how many letters he sent to defendants requesting the files, or when they were sent. (Id.at 44-45). Plaintiff cites several cannons of the Illinois Rules of Professional Conduct in support of his assertion that defendants were obligated to turn over his legal files on demand, and in their failure to do so, committed a conversion. This assertion is without merit. Although a failure to comply with the cannons which govern attorney conduct may be an ethical breach, it is not a legal conversion. The violation of a Rule does not rise, standing alone, to a cause of action, nor does it necessarily establish that legal duty has been violated. Plaintiff simply has not supported his claim that defendants converted his legal files by refusing to turn them over to him on

demand. As counsel, they did not make an "unauthorized or wrongful assumption of control" over plaintiff's legal file. Plaintiff had, at best, an intangible right of access to information in the files. See.e.g. Corrigan v. Armstrong, Teasdale,et al.,824 S.W2d 92,98 (Mo. App. 1992). The defendants have clearly shown that plaintiff had access to the files. Plaintiff's equivocating at his depositions to what he did when, and his inability to place evidence in the record of his efforts to acquire the files, simply cannot be the basis for a finding of a genuine issue of material fact on this issue. The Court notes that the affidavit of Dugan provides that he never claimed, nor did Lakin & Herndon claim, a right to possess or control plaintiff's legal file. In addition, Dugan avers that he advised plaintiff that the files would

be available for his retrieval after the firm withdrew. Plaintiff has not countered this affidavit.Although he asserts that he never received the May 7, 1992 letter concerning the availability of the file, this does not equal a refusal be the defendants to turn over the file to plaintiff. See, Hobson's Truck Sales,Inc. v. Carrol Trucking, 276 N.E.2d89,91 (III,App.1971)(mere detention without a demand for and refusal to relinquish is not an actionable conversion). The essence of conversion is not acquisition by the wrongdoer but a wrongful deprivation of the owner thereof." A.T.Kearney,Inc. v. Inca Int'l. 477 N.E.2d 1326,1334 (III.App.1985). Plaintiff's failure to pick up his file does not translate into a conversion by defendants. Accordingly, the Court finds that summary judgment is appropriate.

Defendant's motion for summary judgment

is GRANTED, in favor of defendants Lakin & Herndon, P.C.; The Lakin Law Firm,P.C.; Thomas L.Lakin, Attorney at Law; Theodore R.Diaz, Jr., Attorney at Law; David W.Dugan, Attorney at Law and Jeffery C.Weishaupt, Attorney at Law, and against plaintiff Milos J. Jiricko, on all claims. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: 19 September 1994.

signature of William D.Stiehl,

District Judge

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MILOS J JIRICKO, MD, - PETITIONER

VS.

LAKIN & HERNDON,P.C.
THE LAKIN LAW FIRM,P.C.
THOMAS L LAKIN, Lawyer
THEODORE R.DIAZ, Lawyer
DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

CERTIFICATE OF SERVICE

I, Milos J. Jiricko,MD do swear or declare that on the date, 28th of February, 1996 as required by Supreme Court Rule 29, I have served the Petition for Writ of Certiorari on each party to the above proceadings or that party's counsel, and on every other person required to be served, by deposing an envelope containing the above documents in the United States mail properly addressed to the law firm of Moser & Marsalek, P.C., attn. Patrick J. Horgan, lawyer, 200 North Broadway, Suite 700, St.Louis, Mo 63102 and with first class postage prepaid.

I further declare, that on February 29, 1996, I also served in the same manner, 'Supplemental Appendix 'D'.

The names of those served are as follow:

Lakin & Herndon,P.C.; The Lakin Law firm P.C.; Thomas L.Lakin; Theodore R.Diaz; David W.Dugan and Jeffery C. Weishaupt.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 1996.

Milos J Jiricko, MD
8007 Cottage Garden Dr.,#302
Germantown, MD 20874